American Bar Association
www.supremecourtpreview.org

No. 07-9712

IN THE
Supreme Court of the United States

JAMES BENJAMIN PUCKETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

JONATHAN D. HACKER
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

LARS ROBERT ISAACSON
(*Counsel of Record*)
401 East Corporate Dr.
Suite 100
Lewisville, Texas 75057
(469) 948-4740

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTROUDCTION 1

I. THE GOVERNMENT'S BREACH OF A PLEA AGREEMENT RESULTS IN THE INVOLUNTARY WAIVER OF CONSTITUTIONAL RIGHTS 4

II. RULE 52(b) SHOULD NOT AND NEED NOT GOVERN WHEN DEFENSE COUNSEL DOES NOT OBJECT TO A PLEA-AGREEMENT BREACH 12

A. The Involuntary Character Of Puckett's Waiver Mandates Reversal 12

B. The Plain-Error Rule Serves No Meaningful Function In This Context Because It Is Necessarily Satisfied By The Breach Of A Plea Agreement 16

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Bousley v. United States,
523 U.S. 614 (1998)..... 15

Brown v. Mississippi,
297 U.S. 278 (1936)..... 14

Henderson v. Morgan,
426 U.S. 637 (1976)..... 14

Hill v. Lockhart,
474 U.S. 52 (1985)..... 18

Mabry v. Johnson,
467 U.S. 504 (1984).....2, 5, 6, 19

Machibroda v. United States,
368 U.S. 487 (1962)..... 15

McCarthy v. United States,
394 U.S. 459 (1969)..... 15

Morgan Stanley Cap. Group v. Pub. Utility Dist. No. 1,
128 S. Ct. 2733 (2008)..... 3

Nguyen v. United States,
539 U.S. 69 (2003)..... 15

Rose v. Clark,
478 U.S. 570 (1986)..... 22

Santobello v. New York,
404 U.S. 257 (1971).....passim

United States v. Booker
543 U.S. 220 (2005)..... 9

United States v. Bownes,
405 F.3d 634 (7th Cir. 2005)..... 8, 9

United States v. Dominguez Benitez,
542 U.S. 74 (2004).....13, 14, 19

United States v. Hyde,
520 U.S. 670 (1997)..... 20

United States v. Rivera,
365 F.3d 213 (3d Cir. 2004) 13

United States v. Vaval,
404 F.3d 144 (2d Cir. 2005) 11

United States v. Vonn,
535 U.S. 55 (2002).....12, 13

Washington v. Recuenco,
548 U.S. 212 (2006)..... 16

RULES

Fed. R. Crim. P. 11..... 13

Fed. R. Crim. P. 52.....passim

TREATISES

Corbin, Arthur Linton,
Corbin on Contracts (1962)..... 8, 12

OTHER AUTHORITIES

Federal Judiciary, *Judicial Business of the United States Courts 2007*..... 22

INTRODUCTION

Two undisputed facts frame the question at issue in this case.

First, the Government induced petitioner Jimmie Puckett to waive his right to a jury trial and plead guilty by promising him, in writing and without condition, that the Government would advise the court at sentencing that Puckett qualified for a three-level reduction in his offense level. Puckett has consistently contended, and the Government has never disputed, that if the Government had not made that promise to Puckett, he would not have pleaded guilty, but instead would have exercised his right to contest the Government's case through a trial before a jury of his peers.

Second, the Government unambiguously breached the promise it made to induce Puckett's guilty plea. Not only did the Government fail to advise the Court that Puckett qualified for a three-level reduction as it promised it would, it actively argued *against* such a reduction. In the words of the Solicitor General's brief: "[B]y opposing a downward adjustment in petitioner's offense level for acceptance of responsibility, [the Government] breached the agreement it made with petitioner that he had demonstrated acceptance of responsibility." Gov. Br. 41. The Government evidently decided to violate its promise because Puckett had allegedly engaged in subsequent criminal conduct, but the Government now acknowledges that the plea agreement *could* have been written—*but was not*—to condition the Government's performance of its promise on Puckett's subsequent conduct. *Id.* Instead the Government chose for whatever reason to make its promise unconditional, and thus, "[u]nder the explicit

terms of the agreement . . . the government's breach was obvious." *Id.*

Those two undisputed facts lead inexorably to a crucial legal consequence, one firmly established by this Court's precedents: because the Government violated the unconditional promise it made to induce Puckett's voluntary trial waiver and guilty plea, that waiver and plea can no longer be considered voluntary, and the conviction obtained as a result of the involuntary plea therefore must be deemed void as a matter of due process. The principle enunciated by this Court could hardly be clearer or more specific: "[W]hen the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." *Mabry v. Johnson*, 467 U.S. 504, 509 (1984).

That basic rule is not open to serious question. Rather, the essential issue here is whether that rule applies, requiring reversal of the effectively coerced conviction, when the defendant's lawyer fails to object at sentencing to the Government's breach of a promise made to induce the plea.

The Government contends that reversal is not required in all such cases, because in some situations—including the case at bar, the Government says—the defendant's own actions may drain the Government's earlier promise of all material value to the defendant, thereby excusing the Government from performance of its express contractual obligation. That contention is as wrong as it is brazen. It is fundamental maxim of contract law that a party's duty to perform an obligation is not excused simply by fluctuation in the value of that obligation to the other party. And there is cer-

tainly no principle allowing a party to escape performance simply on the basis of its *own perceived sense* of the value of performance to the other party. The terms of the contract itself define the value of the performance, and unless the contract expressly contemplates some different performance based on changing circumstances, the contract terms must control as written. *Cf. Morgan Stanley Cap. Group v. Pub. Utility Dist. No. 1*, 128 S. Ct. 2733, 2746 (2008) ("It would be a perverse rule that rendered contracts less likely to be enforced when there is volatility in the market.").

That maxim should apply with special force in the plea agreement context. This Court's precedents have repeatedly recognized that the defendant *personally* must announce his voluntary decision to waive trial rights and plead guilty—even defendant's counsel cannot speak for the defendant in waiving those rights. It is surely less plausible that the *prosecutor* should be given the authority or the incentive to decide if and when a Government obligation is valuable enough to the defendant to mandate the Government's promised performance. Just as it is for the defendant alone to decide whether a Government promise is valuable enough to justify a waiver of trial rights in the first instance, it also must be for the defendant alone to decide whether that promise remains valuable enough to justify the waiver, or whether changed circumstances should permit some different performance by the Government. That is why the failure of the defendant's lawyer to ensure full performance of the Government's promise at sentencing is effectively irrelevant to appellate review of a plea-agreement breach—since the central question in such a case must be whether the

defendant's plea remained voluntary despite the breach, the defendant's state of mind is what matters, not whatever statements his lawyer made, *or did not make*, on his behalf. And because defense counsel's silence can have no bearing in this situation, Rule 52(b)—which by definition applies only where a defense counsel's objection silence *is* relevant—has no meaningful application. Even to the extent it does apply, its specific factors will be satisfied every time the Government induces a defendant to plead guilty through a promise the Government subsequently refuses to perform.

I. THE GOVERNMENT'S BREACH OF A PLEA AGREEMENT RESULTS IN THE INVOLUNTARY WAIVER OF CONSTITUTIONAL RIGHTS

The Government agrees that a "guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences." Gov. Br. 27 (citations and internal quotation marks omitted). It further agrees that voluntariness is a requirement of due process, and that the "voluntariness of a guilty plea is assessed in part by whether unfulfilled or unfulfillable promises induced the plea." *Id.* at 28 (quotation omitted). And it finally agrees that the Government "should of course fulfill all its promises in a plea agreement." *Id.*

These concessions should end the matter, for it is undisputed that the plea here was induced by an unfulfilled promise, which thus negated the voluntariness of the waiver embodied in the plea. In effect, the conditions under which Puckett voluntarily waived his rights were supplanted by *different* grounds supplied

by the Government without his consent. His failure to expressly assent to the new grounds deprived the plea of its voluntary character.

The Government nonetheless argues that the voluntariness of Puckett's plea in this case cannot be questioned because the Government's forgone performance had no actual value to Puckett at the time of breach. *Id.* at 28-29. It quotes this Court's observation in *Mabry* that "only when it develops that the defendant was not fairly apprised of its *consequences* can his plea be challenged under the Due Process Clause." *Id.* at 28 (quoting 467 U.S. at 509) (emphasis added). Seizing on the word "consequences," the Government asserts that under the rule articulated in *Mabry*, and applied previously in *Santobello v. New York*, 404 U.S. 257 (1971), the voluntariness inquiry in a plea-agreement breach situation must focus on whether the defendant "received the benefit for which he bargained." Gov. Br. 28. Because the trial court would have given Puckett the same sentence regardless of the Government's recommendation, the argument goes, the Government's promise no longer had real value to Puckett, and thus the violation of that promise did not actually change the terms of the earlier agreement.

The argument is meritless. As a matter of law, it misreads *Mabry*, effectively overrules *Santobello*, and ignores basic principles of contract. And as a matter of fact, it is belied by the record in this case.

Mabry itself does not define "consequences" as narrowly as the Government would. In the same paragraph of the opinion on which the Government relies, *Mabry* makes clear that "[i]t follows" from the requirement that a plea agreement be entered voluntar-

ily "that when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." 467 U.S. at 509. There is no reference to the ultimate sentence as a relevant "consequence" of a plea agreement. The only consequence expressly contemplated by a plea agreement, and the only consequence mentioned in *Mabry*, is the performance promised by the Government and expected by the defendant. Indeed, since neither the defendant nor the Government can control the court's sentencing decision, the *only* consequence relevant to the defendant's decision to plead in this context is the promised sentencing recommendation. That is the most the defendant can bargain for, in other words, but it still has great value—as evidenced by the continued prevalence of plea agreements. The value to the defendant is simply that the Government's recommendation will have certain persuasive force with the Court.

Indeed, contrary to the Government's submission here, a prosecutor's sentencing recommendation may have *greater* value to a defendant, where subsequent developments might otherwise influence the court adversely to the defendant. The fact that a prosecutor stands before the Court and puts the weight of the United States behind a given sentencing recommendation, despite factors that might suggest a higher sentence, might well persuade the court to ignore those factors and accept the prosecutor's recommendation. Or at least a defendant could reasonably believe that to be the case, demonstrating that a Government sentencing promise made to induce a plea may have continuing or even greater value *to the defendant*, no

matter what circumstances transpire subsequent to the plea agreement.

Santobello also demonstrates that the relevant "consequences" are not only those that are reflected in the ultimate sentence. In that case, all parties—prosecutor, defendant, and even trial judge—agreed that the breach of the plea agreement had no effect on the chosen sentence. And there was likewise no dispute that Santobello was in a much better position than he would have been had he gone to trial and been found guilty, even notwithstanding the prosecutor's breach. *See* Pet. Br. 15. But Santobello's objection was to the means by which his guilty plea was obtained, and not to the ultimate "consequence" in his sentence. This Court agreed, holding that it is a "constant factor" in the guilty-plea context that any governmental promise that induces a guilty plea "must be fulfilled," and thus it is a necessary "safeguard[]" that plea agreements be faithfully enforced. 404 U.S. at 262. Not only did the Court not articulate an exception for cases in which a breached promise has no effect on the ultimate sentence, it *expressly rejected* such an exception, which was sought by the prosecution in that case. *Id.* Thus, the only way to adopt the Government's interpretation of *Mabry*'s reference to the "consequences" of a plea agreement is to decide that *Mabry* quietly overruled *Santobello*—a case that *Mabry* repeatedly cites as authoritative.

Quite apart from its misapplication of this Court's precedent on plea agreements specifically, the Government takes a position that makes no sense as a matter of basic contract law. Ordinarily, a breach requires a remedy regardless of the parties' expectations as to value of future performance. As the Government

itself argues, the parties to a plea agreement in which the prosecutor promises to make (or to abstain from making) a sentencing recommendation cannot know the actual value of that promise at the time of formation. Gov. Br. 28 ("The actual value to the defendants of that promise cannot be known at the time the plea agreement is entered . . . ."). This kind of uncertainty is not uncommon in contracting—the Government's stock trading analogy is one example. Gov. Br. 31. But the general rule in contract cases (including those involving agreements for future sale of stock) is that fluctuation in the value of a future obligation *does not excuse performance*—"[t]he risk of decline in value before completion of performance rests on the promisee; and the promisor is not excused from performing the agreed terms by the fact that a great increase in the value or cost of his performance has occurred." 6 Arthur Linton Corbin, *Corbin on Contracts* § 1360, at 485 (1962); *see also United States v. Bownes*, 405 F.3d 634, 636 (7th Cir. 2005) (noting with respect to plea agreements that "[b]y binding oneself one assumes the risk of future changes in circumstances in light of which one's bargain may prove to have been a bad one").[1]

---

[1] The Government argues that petitioner's reference to "material" terms and breaches undermines his argument that a breach always vitiates the voluntariness of a plea agreement. Gov. Br. 27 n.8. This argument is misplaced. "In one sense of the word, there is never such a thing as an immaterial breach. For any breach of contract, an action lies; any breach is material enough for that, although if no substantial injury is shown the damages recoverable are only nominal." 4 Corbin § 946, at 813 (1951). Petitioner intended only to allow for the possibility that some deviations from the terms of an agreement may be demonstrably immaterial—such as when a defendant makes clear on

The Government's rule—that "voluntariness" should depend entirely on whether the defendant understood the "consequences" of his plea only in the sense of its ultimate impact on sentence—would produce untenable results. An intervening change in the law, for example, could cause a defendant who had no reason to anticipate the change to regret having agreed to waive his rights to appeal. The Seventh Circuit confronted precisely such a case in *Bownes*, in which the defendant sought to be excused from his waiver of appellate rights after this Court decided *United States v. Booker*, 543 U.S. 220 (2005). The defendant believed he would have been entitled to a more favorable sentence under *Booker*, and he thus argued "that his waiver was not knowing and intelligent because he had no reason to anticipate the ruling in *Booker*." 405 F.3d at 636. But in *Bownes* the prosecutor had not breached the agreement, and the defendant was therefore bound by it, notwithstanding his failure to appreciate the full value of his waiver at the time he made it. *Id.* at 636-37. Under the theory of voluntariness offered by the Government here, the *Bownes* decision could not stand because the defendant did not foresee the "consequences" of his decision to waive his appellate rights.

The Government invokes the illustration of "defendants *A* and *B*" to support its argument that breach of a plea agreement does not necessarily vitiate the voluntariness of the agreement. Gov. Br. 26-27, 28-29. In this illustration, defendant *B* receives a *better* sen-

---

the record that a particular provision in the plea agreement is not "part of the inducement or consideration" for his plea. *Santobello*, 404 U.S. at 262. That is plainly not the case here.

tencing result as a consequence of a breach, which the Government cites as establishing that some breaches do not result in involuntary pleas that violate due process. But of course the Government invokes a hypothetical illustration only because it can cite *no actual cases* in which a prosecutor breached a sentencing agreement and clearly made the defendant better off as a result. And if such cases did exist they would hardly be relevant here, since few if any defendants would want to rescind a prior plea agreement as involuntary where they ended up with more than they possibly could have expected under the original bargain.[2] The appellate cases the Government does cite do not involve breaches that effectively improved the defendant's bargain, and they do nothing to undermine the rule of *Santobello* and *Mabry* that the more typical plea agreement breach vitiates the voluntari-

---

[2] Such cases also would represent the only circumstance where one could say with *certainty* that an unfulfilled promise did not adversely affect the substantive terms of the original bargain, since the defendant literally got more than he bargained for. While it may be fair to say that due process is not violated in that unusual (perhaps nonexistent) situation, in any other situation it will be impossible to know with certainty what the outcome might have been had the Government fulfilled its promise. As even the Government says here, all the defendant bargains for is "a *chance*" that the court will be influenced by the prosecutor's recommendation. Gov. Br. 28. But when the Government refuses even to make the promised recommendation, the defendant loses *the entirety of his bargain*, i.e., any "chance" at all that the court might be influenced, however slightly, by the Government's sentencing recommendation. In that situation, it is not for prosecutors, or appellate courts, to speculate post hoc about the value of the chance the defendant bargained for, based on whatever variable circumstances arose by the time of sentencing.

ness of the plea and thus necessarily compels reversal of the underlying conviction.[3]

The Government's contention likewise fails as a matter of contract law even if its failure to perform could somehow be justified on grounds of frustration of purpose.[4] When facts operate "to discharge a defendant from further duty, the law does not permit him to retain the benefits of a performance rendered by the plaintiff without making just compensation

---

[3] The best example of this is *United States v. Vaval*, 404 F.3d 144 (2d Cir. 2005), which entirely vindicates Puckett's position. The Government quotes *Vaval* for the proposition that "not every breach requires a remedy." Gov. Br. 29 (alteration and quotation omitted). But what *Vaval* says right after this statement is that "[w]hether a breach by sentence advocacy caused prejudice in the form of an increased sentence is irrelevant to the need for a remedy," citing *Santobello*. 404 F.3d at 154. It then goes on to outline two situations in which no remedy is required, neither of which reflects the Government's theory that plea agreement breaches can be ignored absent a demonstrated effect on the sentence, and neither of which applies here. The first is the "curative performance exception," which applies when the prosecutor ultimately *does* perform under the agreement after an initial breach, which obviously did not happen here. *Id.* at 155. The second, "a very limited exception," applies where "the violation is so minor that it does not cause the defendant to suffer any meaningful detriment." *Id.* As the court clarified, a "minor" violation is *not* determined by whether the breach "affect[ed] the sentence," but whether "the essential elements of the agreement were fulfilled." *Id.* at 155 n.5. This analysis fully supports petitioner's position on materiality, *see supra* note 1, and has no relevance here, where the breach involved a Government promise that was which was "unquestionably the centerpiece of the agreement." *Id.* at 156. Indeed, *Vaval* holds that in these circumstances, the Court "must order a remedy." *Id.*

[4] The Government hints at such an argument without expressly making it. *See* Gov. Br. 39-44.

therefor." 6 Corbin § 1368, at 519. Thus, even if the Government's failure to perform could be justified, it "must make full restitution" of consideration received from Puckett—which means the guilty plea must be vacated. *Id.*

Finally, the Government's theory fails in this case even on its own terms. The Government argues that its breach requires no remedy because performance of its duty would have been of no value to Puckett. Gov. Br. 30, 42. But if that were the case, the Government would have simply made the recommendation it agreed to make, knowing that the trial judge would reject it in light of the contentions set forth in the new PSR. By refusing to do so, the Government implicitly (but unmistakably) acknowledged that the value of its promise to Puckett—even if substantially reduced—had not dwindled entirely to zero. Its contention that its breach did not render Puckett's plea involuntary as a matter of due process is simply untenable.

II. RULE 52(b) SHOULD NOT AND NEED NOT GOVERN WHEN DEFENSE COUNSEL DOES NOT OBJECT TO A PLEA-AGREEMENT BREACH

A. The Involuntary Character Of Puckett's Waiver Mandates Reversal

An involuntary waiver of trial rights is ineffective, requiring reversal on direct appeal even if no objection was lodged below. Pet. Br. 17. The Government disagrees, relying on *United States v. Vonn*, 535 U.S. 55 (2002). Gov. Br. 32. According to the Government, *Vonn* signifies that "Rule 52(b) applies even when the nature of the claimed error is that the defendant did not make an informed waiver of his trial rights." *Id.*

The Government misapprehends the ruling in *Vonn*. That case, like *United States v. Dominguez Benitez*, 542 U.S. 74 (2004) (discussed at Pet. Br. 27), involved an asserted error by the trial court in complying with the "details" of "Rule 11 colloquies," *Vonn*, 542 U.S. at 70, not an error completely erasing the central promise on which the defendant relied in entering the plea. *See United States v. Rivera*, 365 F.3d 213, 213 (3d Cir. 2004) (opinion of the panel sur denial of rehearing en banc) ("Because breach of plea agreement is not an issue addressed by Rule 11, *Vonn*'s holding does not apply . . . ."). Rule 11 requires a trial court to assure itself that the defendant has arrived at a plea voluntarily. Its purpose is chiefly to document voluntariness, not produce it. In *Dominguez Benitez*, this Court noted that proof of prejudice was required in part "because the violation claimed was of Rule 11, *not of due process*," 542 U.S. at 83 (emphasis added), and it further emphasized the "contrast" between a Rule 11 violation and "the constitutional question whether a defendant's guilty plea was knowing and voluntary," *id.* at 84 n.10. As these statements suggests, when the asserted violation goes directly to the voluntariness of the plea and thus *does* implicate due process, the pertinent rule comes not from cases construing Rule 11, but from constitutional cases—including but not limited to *Santobello*—which *mandate* reversal of a conviction obtained by a plea that a defendant was coerced into, whether it be by confusion, mistake, fraud, or otherwise. *Dominguez Benitez* itself articulates a version of this rule: "[W]hen the record contains no evidence that the defendant knew of the rights he was putatively waiving, the conviction *must be reversed*," even if there is "overwhelming evi-

dence that the defendant would have pleaded guilty regardless." *Id.* (emphasis added).

In other contexts involving review of unpreserved objections to Government misconduct leading to conviction, this Court has distinguished between claims of "mere error" and more fundamental challenges to the fairness of the conviction, consistent with Puckett's position here. In *Brown v. Mississippi*, 297 U.S. 278 (1936), for example, the Court reversed a conviction in a case in which the defendants had been tortured until they confessed. The State argued that the defendants had failed to move for the exclusion of the confessions after it had been proven at trial that they had been coerced. This Court refused to rely on the asserted forfeiture to look past the coercion, explaining that the "complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void." *Id.* at 286. The same principle applies here, as *Mabry* and *Santobello* make clear: when the Government induces a defendant to plead guilty by making promises that turn out to be false, it is simply another form of coercion, less gruesome but no more permissible. And where the Government coerces a defendant into waiving key trial rights—rights that only a defendant can *personally* waive—the lack of objection by counsel is simply irrelevant. *See* Pet. Br. 12; *Henderson v. Morgan*, 426 U.S. 637, 646 (1976) (reversing conviction based on involuntary plea despite lack of objection by counsel).[5]

---

[5] The Government contends that *Henderson* is not relevant because it does not expressly describe a standard of review appli-

The Government acknowledges, as it must, that the "unique nature" of some errors requires reversal absent both an objection and a showing of specific prejudice under Rule 52(b). Gov. Br. 34 (citing *Nguyen v. United States*, 539 U.S. 69, 74-75 (2003)). The Government protests that "*Nguyen* bears no resemblance to this case," Gov. Br. 34, but the Government misses the point. Puckett fully acknowledges that the "error in this case is different from the error in *Nguyen*." Pet. Br. 21. But the *principle* recognized in *Nguyen* is that some unpreserved errors fall outside Rule 52(b) and require reversal as a matter of constitutional or statutory principles antecedent to the permissive requirements of Rule 52(b), which allows, but does not require, appellate courts to reverse convic-

---

cable where defense counsel did not object to an error rendering a plea involuntary, and this Court later held in *Bousley v. United States*, 523 U.S. 614 (1998), that "procedural-default principles apply with equal force to claims that involve allegedly involuntary guilty pleas." Gov. Br. 33. But *Bousley* involved a *collateral* attack on a plea through a habeas petition, and the case was applying the significantly more stringent procedural-default rules governing all habeas claims, which "strictly limit[] the circumstances under which a guilty plea may be attacked on collateral review." 523 U.S. at 621. *Bousley* does nothing to undermine *Henderson*'s key premise that an involuntary guilty plea is simply *void* as a matter of due process, *see also McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void."); *Machibroda v. United States*, 368 U.S. 487, 493 (1962) ("A guilty plea, if induced by promises . . . which deprive it of the character of a voluntary act, is void."), which would logically require reversal on direct appeal in all cases even absent a defense counsel objection, especially since defense counsel cannot forfeit a defendant's right to plead not guilty.

tions for *other* types of unpreserved errors, as to which reversal is not already mandatory. Pet. Br. 21.[6]

B. The Plain-Error Rule Serves No Meaningful Function In This Context Because It Is Necessarily Satisfied By The Breach Of A Plea Agreement

Once the involuntariness of a defendant's trial-rights waiver is established, application of the Rule 52(b) factors add little or nothing to the analysis, because they will be satisfied in any case involving the Government's breach of a promise material to the defendant's decision to waive trial rights and plead guilty voluntarily. One therefore can say that the Rule 52(b) factors should not apply because they do no work, or one can say that the factors do apply but always work. Either way, a plea-agreement breach re-

---

[6] For the reasons discussed in the text, reversal should be mandatory for an unpreserved objection to a plea-agreement breach without regard to Rule 52(b)'s specific requirements, whether or not such a breach is described as a "structural error." *See* Pet. Br. 22 n.5. If it is considered a structural error, Rule 52(b) should be categorically inapplicable. Because a structural error is one that "necessarily render[s] a criminal trial unfair or an unreliable vehicle for determining guilt or innocence," *Washington v. Recuenco*, 548 U.S. 212, 218-219 (2006), a structural error can never be harmless under Rule 52(a). And the critical difference between Rule 52(a) and Rule 52(b) is simply which party bears the burden of proving prejudice—the Government bears the burden of proving lack of prejudice for a preserved error under Rule 52(a); the defendant must prove prejudice for an unpreserved error under Rule 52(b). But if a "structural error" *necessarily* makes a trial unfair or unreliable, then prejudice *always* exists, so it should not matter which party bears the burden concerning prejudice.

quires reversal even if the defendant's counsel did not object to the breach.

1. The first two Rule 52(b) factors ask whether there is an error, and whether it is "plain" or obvious. As noted above, the Government concedes the obviousness of the breach here, and it does not dispute that a material breach will be obvious in almost all cases. Pet. Br. 25 n.6. The Government also correctly identifies an error in petitioner's opening brief, which contended that Rule 52(b) cannot be applied to plea-agreement breach because they normally will not be obvious to the court. That is incorrect, given the requirements of Rule 11. Gov. Br. 20. But that hardly suggests that Rule 52(b) sensibly applies to plea-agreement breaches; to the contrary, it only further establishes that every material breach will (or should be) obvious to the court, so that the obviousness inquiry becomes largely meaningless in this context.

2. The first Rule 52(b) factor that even arguably matters in this context is the third, i.e., whether the error prejudices the defendant's substantial rights. As *Santobello* and other cases firmly establish, the breach of promise made to induce a plea *necessarily* prejudices the defendant's right to plead guilty voluntarily, with an accurate understanding of the conditions, benefits, and consequences of his plea.

The Government's sole response is that prejudice cannot be measured by the effect on the defendant's decision to plead guilty, but must focus solely on whether the defendant's *sentence* would have been different absent the breach. Gov. Br. 35-37, 42. As affirmative support for this position, however, the Government cites nothing more than circuit-court precedents examining prejudice to the sentence (Gov. Br.

36-37), none of which actually *justifies* that approach in light of clear precedents like *Santobello* and *Mabry* requiring focus on the guilty plea induced by the unfulfilled promise.

Beyond its empty circuit-court citations, the Government can only contend that its proposed focus on the sentence is "consistent" with and "not . . . contrary" to the relevant precedents of this Court. Gov. Br. 36-37. Notably, the Government does not even attempt to contend that any precedent of this Court actually *supports* focusing on the sentence rather than the plea. And its efforts to distinguish away the relevant precedents fall woefully short.

The Government ignores *Mabry* and *Brady*, but it does contend that *Santobello* permits courts to focus solely on the sentence and to ignore the plea. Gov. Br. 37. The basis for this conclusion is a mystery—the Government's own discussion of *Santobello* says nothing of the kind. The Government merely recites various facts about *Santobello* (Gov. Br. 37-38), and then simply asserts that *Santobello* "says nothing about whether and how the plain-error standard should be applied in federal cases, subject to Rule 52(b)," where nobody objects to the plea-agreement breach. *Id.* at 38. But the question obviously is not whether *Santobello* expressly enunciates the Rule 52(b) standard—as a constitutional case arising from state court, Rule 52(b) plainly had no direct application. The question here is simply whether *Santobello* says anything about what constitutional *rights* are *prejudiced* by a plea agreement breach. And *Santobello* could not be clearer: the constitutional problem focuses entirely on the voluntariness of the defendant's plea, *not* on the propriety of whatever sentence the court might enter

following the plea breach—the principle later reiterated in *Mabry* (and ignored by the Government). Pet. Br. 14-15. Indeed, *Santobello* expressly holds that any effect on the sentence is *categorically irrelevant* to the constitutional violation perpetrated by the plea-agreement breach. 404 U.S. at 262. That holding (also ignored by the Government) necessarily governs the question under Rule 52(b) of which rights were prejudiced by an obvious plea agreement breach to which defense counsel did not object.

The Government also contends that an approach to prejudice focusing on the sentence and ignoring the plea is "consistent with" *United States v. Dominguez Benitez*, 542 U.S. 74 (2004) and *Hill v. Lockhart*, 474 U.S. 52 (1985). As petitioner's opening brief demonstrated, the Court in those cases specifically noted that, where a defendant asserts prejudicial error in a plea proceeding, the proper inquiry is on whether the defendant would have entered the plea absent the error. As noted above, *Dominguez Benitez* went even further, explaining that "when a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving," it the plea cannot "be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." 542 U.S. at 84 n.10. In other words, prejudice is virtually automatic when the plea is obtained under conditions that render it involuntary. The Government contends that these cases are inapplicable because they involve an "error related to the process through which the guilty plea itself was entered," while this case "relates to the *execution* of a plea agreement." Gov. Br. 37. But as already shown, *Santobello* and *Mabry* make clear "that when the

prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." *Mabry*, 467 U.S. at 509. That is, the breach of an agreement *does* relate back to the "process through which the guilty plea itself was entered," Gov. Br. 37, by falsifying an essential condition on which the plea was predicated.

There is no dispute in this case that Puckett would not have entered the plea agreement if the Government had not made an unconditional promise to advise the court that he qualified for the three-level sentence reduction. Thus, prejudice to his substantial rights is clearly established under the rule of *Hill* and *Dominguez Benitez*, just as it is categorically assumed under *Santobello* and *Mabry*.

3. The breach of a plea agreement always seriously affects the fairness, integrity, and public reputation of judicial proceedings. The Government again disagrees, arguing that reversing a conviction when a breach has no effect on a sentence itself would bring disrepute upon the criminal justice system. Gov. Br. 39-40, 43-44.

This argument simply rehashes the Government's flawed insistence that prejudice to the sentence is all that matters, not prejudice to the plea itself. The Government does not even begin to explain why allowing prosecutors to make false promises about sentencing to induce guilty pleas *that otherwise would not be entered* reflects well on the fairness and integrity of the judicial system. Our system simply does not tolerate involuntary guilty pleas—it certainly does not excuse them simply because the misconduct that led to the coerced plea might not also have affected the

sentence entered after the constitutionally invalid conviction.

The Government further argues that a rule of automatic reversal would encourage defendants to "degrade the otherwise serious act of pleading guilty into something akin to a move in a game of chess," in which a defendant unable to demonstrate an effect on his sentence would have "the option, often years after the fact, of putting the government to its proof." Gov. Br. 40 (quotation omitted). This argument is remarkable. The only way a defendant, even in theory, could ever treat plea bargaining as a "game of chess" in this context is *if the Government first violates a promise it made to induce the plea ab initio*. If the concern is for the system's integrity, the question must be, which rule incentivizes behavior more destructive to the system? A rule that allows the Government to escape the clear obligations of a plea agreement whenever it thinks a court can be persuaded that the obligation is not worth enforcing? Or a rule that allows the defendant to escape a prior agreement, but still face the prospect of a trial and/or plea re-negotation, if, but only if, the Government takes the first step of deciding unilaterally to violate its plea-agreement obligations? The answer should be clear. This is not a situation involving a harried trial-court judge forced to make many trial rulings on the fly, where parties generally must be expected to point out potential errors to help ensure a reasonably fair trial. Here the prospect of error, and hence the chance for any further "games," is entirely within the control of the Government. It can choose to abide by its promises, or it can choose to violate them. If it chooses the latter course, it is in no position to lecture the defendant victimized by such

deceit about the importance of fairness and integrity of the plea bargaining system. *See Santobello*, 404 U.S. at 262.[7]

The Government's protestations about gamesmanship by defendants ring especially hollow in this case. It is true, of course, that Puckett's trial counsel did not object to the breach of the plea agreement during sentencing. But *Puckett himself* openly complained that "I would never have entered a plea that I received no benefit from. I made that plea based on promises that I have documented here. . . . You know, promise for sentence reductions. I don't think they have happened." J.A. 104a. He did not sit on his hands and he was not playing games. He was plainly trying to explain to everyone in the courtroom that he did not get what he was promised in the plea agreement. The Government must have recognized that his protest was rooted in the agreement. But it was the Government that stood silent, no doubt hoping that neither Puckett nor his counsel would assert an adequately clear, express objection to the breach, so that the Government then could checkmate Puckett with Rule 52(b) on appeal, effectively immunizing its decision to

---

[7] The Government's assertion that allowing defendants to obtain reversal on appeal post-sentence would "often" add "years" to the case (Gov. Br. 40) is obviously overstated. The median time interval between the filing of a notice of appeal and the disposition of the appeal in a criminal case in federal court is 12.1 months. Federal Judiciary, *Judicial Business of the United States Courts 2007* tbl. B-4A, *available at* http://www.uscourts.gov/judbus2007/contents.html. That interval thus would normally impose little burden on the Government in terms of preparing a case for trial. In any event, any delay will always be of the Government's own making.

violate the unambiguous, unconditional promise it made to Puckett to induce him to plead guilty.

Although this case may constitute a particularly graphic illustration of the harm the Government inflicts on the integrity of the system when it decides to violate promises made to induce a guilty plea, the broader point is that such violations *never* reflect well on the system. Even to the extent the Government needs flexibility to respond to the kind of changed circumstances allegedly involved here, the answer is not to make unconditional promises and then violate them—the correct answer is to write plea agreements that allow for necessary flexibility, which can easily be done, as the Government acknowledges. Gov. Br. 41. Because the Government's breach of a plea agreement necessarily harms the fairness, integrity, and reputation of the judicial system and the plea bargaining process, this Rule 52(b) factor, too, does little meaningful work in any given case in which a defendant's counsel fails to object to such a breach.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings consistent with Fifth Circuit precedent.

Respectfully submitted,

JONATHAN D. HACKER
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

LARS ROBERT ISAACSON
(*Counsel of Record*)
401 East Corporate Dr.
Suite 100
Lewisville, Texas 75057
(469) 948-4740

Attorneys for Petitioner

January 7, 2009